Supreme Court, U.S.
FILED
JUL 21 2003
OFFICE OF THE CLERK

(3)

No. 02-1710

In the Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

MARK G. WEINBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF MAJOR LEAGUE BASEBALL, THE NATIONAL HOCKEY LEAGUE, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE, THE UNITED CENTER AND U.S. CELLULAR FIELD IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a locally enacted restriction on peddling around a major sports arena serves an obvious and significant governmental interest in public safety.

2. Whether a locally enacted restriction on peddling around a major sports arena is narrowly tailored when it prohibits peddling within 1000 feet of the arena.

3. Whether a locally enacted restriction on peddling around a major sports arena leaves open adequate alternative channels for persons who wish to exercise First Amendment rights.

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INTEREST OF THE AMICI CURIAE

Major League Baseball is an association of 30 professional baseball teams. The National Hockey League is an association of 30 professional hockey teams. The National Football League is an association of 32 professional football teams. The National Basketball Association is an association of 29 professional basketball teams. U.S. Cellular Field is a 47,098 seat stadium in Chicago that is home to the Chicago White Sox. The United Center is a 21,711 seat arena in Chicago that is home to the Chicago Bulls basketball team and the Chicago Blackhawks hockey team.[1] Collectively, the amici represent over 120 professional sports teams. These teams compete at, and in some cases own, operate or manage, more than 100 sports arenas in virtually every major city in the United States and Canada. Seating capacity at arenas used by the amici's members ranges from 16,210 to 86,484. Quite simply, these arenas are among the largest public venues in the world.

The decision below strikes down, on First Amendment grounds, a City of Chicago ordinance that restricts peddling within 1000 feet of the United Center. Similar local regulations are in effect at sports arenas across the country. These regulations alleviate congestion around sports arenas and help ensure the safety of tens of millions of visitors who attend major league sporting events every year. Regulations like the Chicago ordinance affect speech at best incidentally. Every other circuit to consider the issue has recognized that local governments have a significant interest, consistent with reasonable time, place

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

and manner restrictions on expressive activity, in establishing broad restrictions on peddling in crowded public spaces. This Court's intervention, either by summary reversal or by grant of certiorari, is necessary to protect governments' ability to continue to enact and enforce such regulations.

SUMMARY OF ARGUMENT

Section 4-244-147 of the City of Chicago's Municipal Code (the "peddlers ordinance") provides that "no person shall peddle merchandise of any type on any portion of the public way within 1000 feet of the United Center." In a remarkable break from established doctrine, the Seventh Circuit struck down this ordinance on First Amendment grounds, holding that Chicago failed to prove a significant governmental interest in restricting peddling around a major professional sports arena. The court also held that the ordinance's 1000 foot perimeter restricted more speech than necessary and thus was not "narrowly tailored," and that the ordinance did not leave open "adequate alternative channels" for the respondent because he had an expressive message uniquely targeted to sports fans who came to the United Center.

These holdings contradict well-established case law on time, place and manner regulations from this Court and several other circuits. The first holding below disregards the government's long-recognized interest in regulating safety and security in crowded public spaces, and instead pioneers a novel and misguided rule that would force local governments to justify such regulations with "empirical" studies. The second holding below misapplies the "narrowly tailored" requirement and discourages local governments from enforcing adequate safety zones around sports arenas. The third holding effectively gives vendors of expressive items such as sports books, T-shirts and caps

a privileged right of First Amendment access to the sidewalks around sports arenas simply because the patrons of those arenas may be particularly receptive to their message. If allowed to stand, this last holding would effectively nullify peddling restrictions around sports arenas and drastically increase congestion on the surrounding sidewalks.

Amici are also concerned that the Seventh Circuit's opinion will weaken local governments' ability to support a secure environment around large, crowded sports arenas. After September 11, 2001, amici and their member teams poured enormous tactical and financial resources into re-evaluating and strengthening every aspect of public safety and security at major sporting events. Local governments have been a crucial partner in these efforts. Yet the Seventh Circuit's opinion now puts those governments to the increased expense and effort of justifying sports arena safety ordinances with objective studies, and exposes municipalities who enforce such ordinances to the threat of *Monell* lawsuits for lost profits brought by vendors who argue that peddling restrictions are unconstitutional. The First Amendment does not require such outcomes, and the Seventh Circuit's repudiation of well-settled time, place and manner precedents should be set aside.

ARGUMENT

I. THE PEDDLERS ORDINANCE SERVES AN OBVIOUS PUBLIC INTEREST IN KEEPING SPORTS ARENAS SAFE AND SECURE.

The primary holding below was that the City of Chicago failed to prove a significant governmental interest in restricting peddling around the United Center, as required by this Court's precedents reviewing time, place and manner restrictions on free expression in public spaces. *Clark v. Community for Creative Non-Violence*,

468 U.S. 288, 293 (1984); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). The court held that the peddlers ordinance violated the First Amendment because "the City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed" to prove that the ordinance served important public safety interests. Pet. App. 12a. The court also held that the City had not shown a significant interest in enforcing its ordinance against the respondent in particular, a lone bookseller. Pet. App. 11a.

Prior decisions of this Court and other circuits have routinely held that general bans on peddling, camping and other such conduct in a limited, congested geographic area need not be justified by site-specific studies, as the Seventh Circuit held. Rather, local authorities may rely on their own "real world experience." *United States v. Kokinda*, 497 U.S. 720, 735 (1990). In *Community for Creative Non-Violence*, for example, the Court reviewed a Park Service regulation that prohibited overnight camping on the Mall in Washington D.C. The respondents claimed that this infringed on their right to stage an overnight protest with homeless people in tents. There was no indication that the Park Service had done empirical studies about the impact of overnight camping in the Mall, either by individuals or groups. Yet this Court upheld the "no camping" rule as a valid time, place and manner restriction based on nothing more than the Park Service's general expertise in maintaining national parks for the enjoyment of all. 468 U.S. at 293-94. Other circuits have reached the same conclusion in cases reviewing bans on street vendors. *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1015 (9th Cir. 1996) ("Cities need not prove up their interests on a block-by-block basis * * *. Indeed, these types of interests can be presumed to operate throughout a city, absent a strong showing to the

contrary"); *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 498 (D.C. Cir. 1997); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995); accord, *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1551 (11th Cir. 1997) ("to demonstrate the significance of its interest, the City is not required to present detailed evidence of pedestrian or traffic flow on or around specific sidewalks").

The United Center is a major sports arena that gathers tens of thousands of visitors at a time. At trial, the City attested that its peddlers ordinance had significantly reduced congestion and crowding on the streets and sidewalks around the facility. Pet. 12-13; Pet. App. 28a n.2 (officer testimony cited by Easterbrook, J., dissenting from denial of rehearing *en banc*). As a matter of common experience, moreover, sales activity on the sidewalks outside sports arenas increases congestion and slows the orderly movement of people in and out of the arena. This Court has acknowledged as much in discussing the impact of solicitation on public venues. *Kokinda*, 497 U.S. at 734 (upholding speech restrictions on post office sidewalk, and noting that "solicitation requires action by those who would respond"); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-684 (1992) (upholding solicitation ban at airport). Anyone who attends major sporting events knows that traffic flow in and out of the arenas is always a concern, and has become a bigger issue since the September 11 terrorist attacks. Lines and wait times have increased in the wake of security checks that are now required prior to patrons' entering the sports arena.

Other sources in the public domain support Chicago's judgment that a peddling restriction around a major sports stadium serves important interests. A recent advisory issued by the Department of Homeland Security reminds

the public that "recreational" venues "that will yield a high casualty count" are prime targets for terrorism. The advisory points out that "nearly every major terrorist attack is preceded by a thorough surveillance of the targeted facility. * * * In fixed surveillance scenarios, terrorists may establish themselves in a public location over a period of time or choose disguises or occupations such as street vendors * * *." Homeland Security Advisory, *Potential Indicators of Threats Involving Vehicle Borne Improvised Explosive Devices*, May 15, 2003. The advisory also cautions facilities operators to watch for "packages, devices, unattended briefcases, or other unusual materials" – but of course if there is extensive peddling outside a sports arena, such objects will be abundant and difficult to monitor. Remote though such dangers may be, they support deference to Chicago's ordinance.

The Seventh Circuit clearly erred in reading this Court's time, place and manner precedents to require the City to justify its peddlers ordinance with site-specific empirical studies. The court also erred, for reasons well articulated in the City's petition, in requiring the City to prove a significant interest in enforcing its ordinance against the respondent's bookselling activity viewed in isolation. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The City's interest in its peddler's ordinance was amply supported both by the evidence at trial and by "history, a substantial consensus and simple common sense." *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion).

II. THE ORDINANCE'S "NO PEDDLING" ZONE IS NARROWLY TAILORED.

Amici are equally concerned about the second prong of the Seventh Circuit's decision, which held that the City's 1000 foot restriction on peddling around the United Center

was not "narrowly tailored." Specifically, the lower court found that "the 1,000 foot restriction overcompensates for an alleged congestion problem on the sidewalks around the United Center." Pet. App. 14a. The court apparently viewed the ordinance's purpose as limited to "alleviat[ing] sidewalk congestion and prevent[ing] pedestrian traffic from spilling into the streets," and held that this could not justify "a restriction which prevents a peddler from selling his wares in large parking lots, less congested walkways or sidewalks in less proximity to the United Center." *Id.*

Based on their members' collective experience, amici respectfully suggest that the Seventh Circuit either misunderstood or failed to consider the numerous public benefits of a 1000 foot restriction on peddlers around a major sports arena. The United Center is surrounded by large parking lots, much like U.S. Cellular Field and many other arenas around the country. Before and after games, those parking lots become heavily congested with patrons walking to or from their cars and traffic entering the lots or exiting onto the city streets. A peddling restriction in such areas enhances the safe, efficient movement of people and vehicles in and out of the area. It also seems obvious that unattended carts, parcels and other such objects carried by peddlers are harder for security personnel detect when they are far away from the facility – and yet they remain potentially dangerous in a crowded parking lot. The Seventh Circuit ignored these important interests when it implied that the peddlers ordinance should be restricted to sidewalks immediately adjacent to the sports facility itself.

In enacting a 1000 foot restriction on peddling around the United Center, the City of Chicago acted to facilitate the smooth flow of traffic in and out of the arena and its parking lots, and to maintain a safe and secure perimeter around that facility. This was sufficient to make the ordinarce narrowly tailored, because regulations that

incidentally impact speech need not be the least restrictive means of achieving the government's goal. *Ward*, 491 U.S. at 797. Instead, a regulation will pass muster if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. The record below easily establishes that the 1000 foot perimeter serves valid safety interests and is therefore "narrowly tailored" consistent with First Amendment law.

This Court's decisions also counsel deference to Chicago's judgment about the proper boundary of the peddling zone. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976), for example, upheld a Detroit ordinance requiring adult movie theaters to be located 1000 feet from one another or from a residential neighborhood. The Court affirmed that "the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods," and noted that "[i]t is not our function to appraise the wisdom of [the city's] decision * * *." *Id.* at 71. More recently, the Court acknowledged it "must accord a measure of deference" to a local legislative judgment about the protest buffer zone around entrances to medical facilities, and upheld the regulations as "narrowly tailored." *Hill v. Colorado*, 530 U.S. 703, 727 (2000). Applying these principles, other circuits have upheld "blanket" peddling bans in crowded areas against charges that they restricted more peddling than necessary and were not "narrowly tailored." *Friends of the Vietnam Veterans Memorial*, 116 F.3d at 498; *One World One Family Now*, 76 F.3d at 1015. The Seventh Circuit clearly erred in overturning Chicago's judgment that its peddlers ordinance should extend 1000 feet from the United Center in order to cover surrounding parking lots as well as the adjacent sidewalks.

III. VENDORS OF EXPRESSIVE SPORTS ITEMS HAVE NO SPECIAL FIRST AMENDMENT RIGHT TO SELL NEAR SPORTS ARENAS.

In the final prong of its time, place and manner analysis, the Seventh Circuit concluded that the peddlers ordinance did not afford respondent "adequate alternative channels" to sell his book criticizing management of the Chicago Blackhawks hockey team. The court reasoned that "the most opportune time and place" for respondent to reach "his intended audience of Chicago Blackhawks fans" was "outside the United Center, before and after Blackhawks home games." Pet. App. 17a. Although the court conceded that "an adequate alternative does not have to be the speaker's first choice," Pet. App. 15a, citing *Heffron*, 452 U.S. at 647, it nevertheless concluded that Chicago must bend its ordinance to accommodate the respondent because "the United Center is a unique location for the sale of Weinberg's book." Pet. App. 17a.

This analysis is misplaced and misguided for at least two reasons. First, Weinberg had other ways to distribute his message to patrons of the United Center that were permitted under the ordinance. He could have sold a newspaper version of his book, for example, or passed out a leaflet detailing how to buy the book elsewhere. It is well established that a time, place and manner regulation does not fail to afford "adequate alternatives" for speech simply because it makes selling that speech somewhat more costly or inconvenient. For example, this Court has upheld municipal zoning restrictions on adult book stores, despite the complaint that such regulations made those businesses less profitable. *City of Renton v. Playtime Theatres, Inc.*, 471 U.S. 41, 54 (1986); *American Mini Theaters*, 427 U.S. at 71. Any added burden on Weinberg of selling newspapers or handing out sales leaflets outside the United Center seems no more onerous than the zoning

restrictions upheld in *Renton*. Accord *Members of City Council*, 466 U.S. at 812 (rejecting argument that regulation prohibiting posting signs on public property failed to provide adequate alternatives).

This reasoning is not inconsistent with the line of cases relied on by the Seventh Circuit. Those decisions upheld, for example, the right to build "shanties" within view of a college administration building, see *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333 (W.D. Va. 1987), or the right to conduct a demonstration within view of local naval leaders, see *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990). The regulations of speech in these cases were struck down because they effectively separated the speakers from their intended audience. In contrast, the peddlers ordinance did not remove Weinberg and his message from the United Center at all. Rather, it only curbed a particular means of distributing his message, namely, the physical sale of books within 1000 feet of the building. Other circuits have repeatedly upheld flat bans on peddling where alternatives like leafleting are available. *One World One Family Now*, 76 F.3d at 1014; *Friends of the Vietnam Veterans Memorial*, 116 F.3d at 497. This Court's decisions recognizing the distinctions between leafleting and solicitation are in accord. *Kokinda*, 497 U.S. at 734; *Lee*, 505 U.S. at 689 (O'Connor, J., concurring).

A second and more serious problem with the Seventh Circuit's "adequate alternatives" analysis is that in practice, it gives vendors of sports merchandise a special First Amendment right of access to the sidewalks around major sports arenas. At first blush this case seems unique, even humorous – a hockey fan becomes so irate that he goes to the trouble and expense of publishing *an entire book* excoriating the owners of his local team. Shouldn't he be allowed to sell his book outside the local arena?

But it would be wrong to view the Seventh Circuit's decision as harmless, a nod, as it were, to the dedicated fan. This Court's cases make clear that all manner of expressive items are entitled to First Amendment protection, not just books. *Cohen v. California*, 403 U.S. 15, 16 (1971) (jacket bearing words "Fuck the Draft"); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969) (protest armbands); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (burning a flag). The Seventh Circuit itself has emphasized that T-shirts, hats, buttons and the like are expressive media entitled to the same protections as leaflets and newspapers. *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 703 (7th Cir. 1998); *Ayers v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997).

As a result, under the Seventh Circuit's "adequate alternatives" holding, every vendor of all wares targeting the sports fans of a particular arena will be exempt from local peddling bans. A home team's sports arena is always "a unique location" for the sale of expressive items that champion – or criticize – the home team. Weinberg's book is no different in this respect from T-shirts, hats or pennants. If left in place, the Seventh Circuit's decision would generate an explosion of peddlers outside sports arenas, and the important safety interests served by peddlers bans at sports stadiums would be effectively nullified. This problem cannot be solved by an ordinance that makes an exception for speakers like Weinberg who have a critical, rather than commercial, objective, because "to create an exception for appellee's political speech and not [] other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." *Members of City Council*, 466 U.S. at 816.

IV. THE DECISION BELOW CHILLS LOCAL ENFORCEMENT OF SAFETY REGULATIONS AROUND SPORTS ARENAS.

Amici's final concern with the Seventh Circuit's decision is that it deters local governments from acting as effective partners in amici's effort to maintain safe and secure major league sports arenas. For a "no peddling" zone around a sports stadium to enhance public safety, it cannot just be on the books – it must also be enforced. And in several respects, the Seventh Circuit's opinion makes it more costly and risky for local governments to enforce peddlers ordinances around sports venues.

First, the Seventh Circuit's opinion raises questions about the constitutionality of such ordinances. As discussed above, the court seems to have created a new First Amendment rule for stadium peddlers, and vendors of items expressing views about the local team now have a colorable claim that a peddling ban around the local arena is unconstitutional, at least as applied to them. This has profound consequences for local law enforcement. Local authorities may worry about the municipality's liability for money damages, because under *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), vendors who challenge the peddling ban's constitutionality may seek lost profits as well as an injunction. The risk of *Monell* liability is highest, moreover, when a legislative act like an ordinance is at issue. *Board of County Commissioners v. Brown*, 520 U.S. 397, 403-404 (1997) (municipality "liable only for those deprivations resulting from the decisions of its duly constituted legislative body").

Even if a municipality has full confidence that its no-peddlers zone around a sports arena is constitutional, the lower court's holding still raises the costs of effective enforcement. The Seventh Circuit's opinion suggests that if local authorities plan on defending a peddlers ordinance

in court, they must develop site-specific empirical studies to support their judgment that such an ordinance serves important public safety objectives. In the tight budget environment faced by many local governments, they may choose not to fund such studies – and without the evidence now required in the Seventh Circuit, they may be less willing and less successful in their enforcement efforts. Taken together, the foregoing concerns seem likely to deter, if not eliminate altogether, local enforcement of peddlers bans around sports arenas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2003